IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

LORENA BALDELAMAR, Plaintiff, v. JEFFERSON SOUTHERN CORPORATION, Defendant.	CIVIL ACTION FILE NO. 4:15-CV-00209-HLM-WEJ

ORDER

This is an employment discrimination case in which Plaintiff complains of sexual harassment and retaliation, in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and also asserts a state law claim for negligent retention. The case is before the Court on Defendant's Motion for Summary Judgment [50], on the

Final Report and Recommendation of United States Magistrate Judge Walter E. Johnson [63], on Defendants Objections to the Final Report and Recommendation [65], and on Plaintiff's Objections to the Final Report and Recommendation [66].

I. Standard of Review

28 U.S.C. § 636(b)(1) requires that in reviewing a magistrate judge's report and recommendation, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The Court therefore must conduct a de novo review if a party files "a proper, specific objection" to a factual finding contained in the report and recommendation. Macort v. Prem, Inc., 208 F. App'x 781, 784 (11th Cir. 2006); Jeffrey S. by Ernest S. v. State Bd.

of Educ., 896 F.2d 507, 513 (11th Cir. 1990); United States v. Gaddy, 894 F.2d 1307, 1315 (11th Cir. 1990); LoConte v. Dugger, 847 F.2d 745, 750 (11th Cir. 1988). If no party files a timely objection to a factual finding in the report and recommendation, the Court reviews that finding for clear error. Macort, 208 F. App'x at 784. Legal conclusions, of course, are subject to de novo review even if no party specifically objects. United States v. Keel, 164 F. App'x 958, 961 (11th Cir. 2006); United States v. Warren, 687 F.2d 347, 347 (11th Cir. 1982).

II. Background

A. Procedural Background

On November 7, 2015, Plaintiff filed this lawsuit. (Compl. (Docket Entry No. 1).) On February 10, 2016, Plaintiff filed her First Amended Complaint. (First Am. Compl. (Docket Entry No. 21).) The First Amended

Complaint contained the following claims: (1) a Title VII retaliation claim (id. ¶¶ 21-25); (2) a Title VII sexual harassment hostile work environment claim (id. ¶¶ 26-30); and (3) a negligent retention claim arising under O.C.G.A. § 34-7-20 (id. ¶¶ 31-35).

On July 20, 2016, Defendant filed its Motion for Summary Judgment. (Mot. Summ. J. (Docket Entry No. 50).) On October 13, 2016, Judge Johnson issued his Final Report and Recommendation. (Final Report & Recommendation (Docket Entry No. 63).) Judge Johnson recommended that the Court grant Defendant's Motion for Summary Judgment as to Plaintiff's Title VII sexual harassment hostile work environment claim and her negligent retention claim, but also recommended that the Court deny the Motion as to Plaintiff's Title VII retaliation claim. (See generally id.)

Plaintiff and Defendant both filed Objections to the Final Report and Recommendation. (Def.'s Objs. (Docket Entry No. 65); Pl.'s Objs. (Docket Entry No. 66).) Defendant filed a response in opposition to Plaintiff's Objections. (Def.'s Resp. Pl.'s Objs. (Docket Entry No. 67).) Plaintiff, however, did not file a response in opposition to Defendant's Objections. (See generally Docket.) The time period in which Plaintiff could file a reply in support of her own Objections has expired, and the Court finds that the matter is ripe for resolution.

B. Factual Background

The Court follows Judge Johnson's practice of evaluating the Parties' proposed material facts and their responses to proposed material facts. (Final Report & Recommendation at 1-10.) As required by the Local Rules, Defendant filed a Statement of Undisputed

Material Facts ("DSMF") in support of its Motion for Summary Judgment. (Docket Entry No. 50-1.) As also required by the Local Rules, Plaintiff filed a response to DSMF ("PRDSMF"). (Docket Entry No. 58.) As permitted by the Local Rules, Plaintiff filed her own statement of additional material facts ("PSAF"). (Docket Entry No. 59.)[1] Defendant filed a response to PSMF ("DRPSMF") (Docket Entry No. 62.)

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[1] The Court agrees with Judge Johnson that PSMF "fails in many instances to comply with either the letter or the spirit of the Local Rules." (Final Report & Recommendation at 3 (footnote omitted).) Judge Johnson correctly excluded as repetitive or duplicative PSMF ¶¶ 1, 4-5, 7-8, 12, 14-16, and 41. (Id.) Likewise, Judge Johnson properly excluded as immaterial PSMF ¶¶ 17-19, 77, 114, and 116-134, as well as part of PSMF ¶ 112, which relate to a former Defendant employee named Rico Reyes, also known as Refugio Reyes or Rodrigo Cornejo. (Id. at 3-6.) Judge Johnson also correctly excluded as immaterial PSMF ¶¶ 24-40, relating to Defendant's allegedly arbitrary document retention policies and alleged failure to preserve evidence. (Id. at 6.) Similarly, the Court agrees with Judge Johnson that PSMF ¶¶ 20-23, 41-60, 74-76, 92-96, 110, 113, and 115 are immaterial. (Id. at 6-7.) Judge Johnson also properly determined that PSMF

1. Defendant's Plant and Stamping Department

Defendant is a Tier One automotive parts supplier located in Rockmart, Georgia. (DSMF ¶ 1; PRDSMF ¶ 1.) Defendant's Rockmart plant employs about 230 full-time employees and approximately eighty-five part-time employees. (PSMF ¶ 11; DRPSMF ¶ 11.) A number of the plant's employees speak Spanish, and a number of the employees speak Japanese. (PSMF ¶¶ 61-62; DRPSMF ¶¶ 61-62.) The Court agrees with Judge Johnson that: "Given those two proposed facts, the majority of the plant's employees presumably speak English." (Final Report & Recommendation at 10.)

¶¶ 78-83, 90-91, and 97-98 are immaterial. (Id. at 7-8.) Finally, Judge Johnson properly excluded as immaterial, lacking foundation, or inadmissible hearsay PSMF ¶¶ 2-3, 6, 84-89, 102-04, and 148. (Id. at 9.) To the extent that Plaintiff objects to those exclusions, the Court overrules the objection.

Defendant's Rockmart plant has a Stamping Department. (DSMF ¶ 2; PRDSMF ¶ 2.) A Department Manager oversees the Stamping Department. (DSMF ¶ 3; PRDSMF ¶ 3.) A Coordinator oversees each shift in the Stamping Department. (DSMF ¶ 4; PRDSMF ¶ 4.) Coordinators supervise the production employees by setting their work schedules and issuing discipline when necessary. (DSMF ¶ 5; PRDSMF ¶ 5.) Zeferino Duque was the Coordinator for the first shift. (DSMF ¶ 12; PRDSMF ¶ 12.)

The Stamping Department has Team Leaders who relay orders from Coordinators to production employees and who assist production employees while performing similar physical work. (DSMF ¶ 6; PRDSMF ¶ 6.) Carlos Chavez works as a Team Leader on the first shift. (DSMF ¶ 7; PRDSMF ¶ 7.) Plaintiff worked as a Forklift

Driver in the Stamping Department on the first shift. (DSMF ¶ 11; PRDSMF ¶ 11.)[2]

Team Leaders cannot set work schedules for production employees, cannot make compensation decisions, and cannot issue discipline. (DSMF ¶ 8; PRDSMF ¶ 8.) Plaintiff never received a disciplinary write-up issued by Mr. Chavez. (DSMF ¶ 9; PRDSMF ¶ 9.) Plaintiff admits that Mr. Chavez could not write her up. (DSMF ¶ 10; PRDSMF ¶ 10.)[3]

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[2] Plaintiff is a Mexican-American female and a permanent resident of the United States who has lived in the United States for twenty-seven years, and she has lived in Georgia since 1996. (PSMF ¶ 13; DRPSMF ¶ 13.)

[3] Judge Johnson properly excluded Plaintiff's subjective beliefs about the authority of Team Leaders expressed in PSMF ¶¶ 152 and 153. (Final Report & Recommendation at 11 n.9.) To the extent that Plaintiff objects to this conclusion, the Court overrules the Objection.

2. Plant and Human Resource Management

In 2001, Ray Wright joined Defendant in 2011 as a Senior Production Manager, and, in November 2012, he became the Rockmart Plant Manager. (DSMF ¶ 14; PRDSMF ¶ 14.) On September 4, 2012, Demetria Strozier joined Defendant as the Human Resources Manager. (DSMF ¶ 16; PRDSMF ¶ 16.) Before Ms. Strozier, Steve Blankenship served as Defendant's Human Resources Manager. (PSMF ¶ 9; DRPSMF ¶ 9.)

3. Defendant's Policies

Defendant maintains "no discrimination" and "no harassment" policies, including providing alternative avenues for employees to report complaints. (DSMF ¶ 17; PRDSMF ¶ 17 (admitting only that said policies exist).) Those policies are part of Defendant's Employee Handbook, a copy of which Plaintiff received most recently in 2012. (DSMF ¶ 18; PRDSMF ¶ 18 (admitting only receiving the handbook).) Employees can also report discrimination or harassment by using Defendant's Ethics Hotline. (DSMF ¶ 19; PRDSMF ¶ 19 (admitting the hotline's existence, but denying that Plaintiff knew of it in July 2015).)[4] Finally, employees can lodge complaints by going directly to the Human Resources Office or by leaving a note in the complaint box located outside of that Office. (DSMF ¶ 20; PRDSMF ¶ 20.)

Plaintiff asserts that her first language is Spanish, and that she does not read or speak English very well. (PSMF ¶ 64; DRPSMF ¶ 64.)[5] Plaintiff contends that, because the Handbook is communicated only in English, she did not understand its contents. (PSMF ¶ 63; PRDSMF ¶ 18; see also PSMF ¶ 72; DRPSMF ¶ 72.) The Court agrees with Judge Johnson that "any dispute over whether [Defendant] should have translated the Handbook into Spanish to insure broad dissemination of its 'no discrimination' and 'no harassment' policies is immaterial, as [P]laintiff admits she knew that the Human Resources Office was the place where she should report complaints of alleged harassment (and she did, as discussed infra)." (Final Report & Recommendation at 13 (citing DSMF ¶ 21; PRDSMF ¶ 21.)[6] It is also undisputed

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[4]Plaintiff never lodged a complaint about sexual harassment through the Ethics Hotline. (DSMF ¶ 30; PRDSMF ¶ 30.)

[5] Ms. Strozier declares that she communicated with Plaintiff in English. (Decl. of Demetria Strozier (Docket Entry No. 50-13) ¶ 10.) Although Plaintiff claims that she cannot speak English, she sometimes answered questions asked during her deposition

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before the interrogating attorney's words were translated into Spanish. (See, e.g., Dep. of Pl. (Docket Entry No. 50-3) at 138.)

[6] As a result, Judge Johnson correctly excluded as immaterial PSMF ¶¶ 66-73. (Final Report &Recommendation at 13 n.12.) To the extent that Plaintiff objects to those exclusions, the Court overrules the objection.

that management was able to communicate to Defendant's Spanish-speaking employees through its bilingual employees. (DSMF ¶ 22.)[7] For example, during her employment, Plaintiff asked Paolo Coronel to translate for her, and Ms. Coronel never refused any such request. (DSMF ¶ 23; PRDSMF ¶ 23.)

4. Events of July 2015 and Defendant's Investigation

According to Plaintiff, on Saturday, July 18, 2015, Mr. Chavez told Plaintiff that she could leave work early if she became his mistress. (PSMF ¶ 155; see also id. ¶ 147 (same).) Mr. Chavez then grabbed Plaintiff's buttocks. (Id. ¶ 154.) No Human Resources personnel were on duty on that date. (Id. ¶ 156; DRPSMF ¶ 156.) Plaintiff contends that, on her own volition, she went to Defendant's Human Resources Office on Monday, July 20 and discussed what Mr. Chavez had said and done the previous Saturday with Human Resources Coordinator Marcus Smith. (PSMF ¶ 157.)

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[7] Judge Johnson properly found that Plaintiff's assertions that Defendant neither designated anyone to provide translation services nor told its employees that translation services were available did not refute Plaintiff's testimony that she used other employees to translate for her. (Final Report & Recommendation at 13 n.13.)

Defendant disputes Plaintiff's claim that she reported the incident to Mr. Smith on July 20. (DRPSMF ¶ 157.) Defendant relies on a July 22 email that Mr. Smith sent to Human Resources Manager Strozier, in which Mr. Smith wrote that he had received a complaint that morning from Mr. Chavez about Plaintiff,[8] and that he then spoke with

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[8]According to Defendant, Mr. Chavez told Mr. Smith that Plaintiff had made an inappropriate comment about him in the break room and that Plaintiff constantly argued when asked to perform her job duties. (DSMF ¶ 25; PRDSMF ¶ 25 (admitting his complaint but objecting to the characterization of her comment as inappropriate).) Mr. Smith's notes also show that

Plaintiff about it. (Id.; see also DSMF ¶ 24; PRDSMF ¶ 24.)

The Parties agree that Mr. Smith summoned Plaintiff to the Human Resources Office on July 22. (PSMF ¶ 158; DRPSMF ¶ 158.)[9] According to Defendant, as Mr. Smith sought Plaintiff's response to Mr. Chavez's

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Mr. Chavez had reported that every time he told Plaintiff to do something, she complained. (Invest. Notes (Docket Entry No. 50-6) at 23.) The inappropriate comment that Plaintiff reportedly made to Mr. Chavez was, "I'm going to take him to the office." (Id.)

[9]Plaintiff had not complained about Mr. Chavez's alleged misconduct to Human Resources employees Paola Coronel or John Beck before July 22, 2015. (DSMF ¶ 27, as modified per PRDSMF ¶ 27.) Before July 22, 2015, Plaintiff had never reported a complaint of sexual harassment to Human Resources Manager Strozier. (DSMF ¶ 28; PRDSMF ¶ 28.) Plaintiff also had never reported a complaint about sexual harassment to Plant Manager Wright at any time during her employment. (DSMF ¶ 29; PRDSMF ¶ 29.) Plaintiff also never reported a complaint about sexual harassment to Coordinator Zeferino Duque. (DSMF ¶ 31.) Although Plaintiff asserts that she submitted a written complaint about Mr. Chavez to Mr. Blankenship, the record that Plaintiff cites to support that proposed fact does not reveal when she submitted that complaint or what it concerned. (PSMF ¶ 135.)

complaint during their July 22 meeting, Plaintiff reported that Mr. Chavez had "slapped her on the butt" and told her that if she became his mistress, then she could go home early from work. (Invest. Notes at 101; see also DSMF ¶ 26; PRDSMF ¶ 26.) After Mr. Smith sent the above-referenced July 22 email to Ms. Strozier notifying her of what he had learned, Ms. Strozier responded that Defendant needed to conduct a full investigation. (DSMF ¶ 32.) The July 22 email mentions Plaintiff's complaint of alleged sexual harassment. (PSMF ¶ 159; DRPSMF ¶ 159.)

The investigation began five days later, on July 27. (PSMF ¶ 160; DR-PSMF ¶ 160.)[10] During the investigation, Ms. Strozier interviewed fourteen individuals, including Plaintiff and Mr. Chavez. (DSMF ¶ 33; PRDSMF ¶ 33.)[11] Zeferino Duque and Satero Cruz told Ms. Strozier that Plaintiff had threatened at some point to have her husband "beat up" Mr. Duque. (DSMF ¶ 37.)[12] Plaintiff denies that she ever told anyone at Defendant that she was going to have her husband beat them up. (PSMF ¶ 177; DRPSMF ¶ 177.) Ms. Strozier also learned from employees she interviewed that Plaintiff argued when asked to perform various job functions. (DSMF ¶ 38.)

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[10] Judge Johnson properly excluded as immaterial or unsupported PSMF ¶¶ 161-65 and 172. (Final Report & Recommendation at 16 n.18.) To the extent that Plaintiff objects, the Court overrules the objection.

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[11]During the interviews, Ms. Strozier learned that four male employees had been slapping each other on the buttocks in a fashion similar to what one might see ballplayers do. (PSMF ¶ 111, as modified per DRPSMF ¶ 111.) Ms. Strozier told the employees to stop doing that. (Dep. of Demetria Strozier (Docket Entry No. 50-5) at 185.)

[12]Judge Johnson properly deemed DSMF ¶ 37 undisputed. (Final Report & Recommendation at 16 n.20.)

In Plaintiff's interview with Ms. Strozier, Plaintiff described what had happened between her and Mr. Chavez on July 18. (Pl. Dep. at 144.) According to Ms. Strozier, Plaintiff said that Mr. Chavez had allowed Alberto Cruz to leave work early on July 18, but had refused Plaintiff's request to leave early unless she became his mistress. (Strozier Decl. ¶ 11.)[13] Ms. Strozier pulled the time records for that day, which showed that both Plaintiff and Mr. Cruz left work at the same time. (Id.; see also DSMF ¶ 44.) Plaintiff asserts, however, that she made no such statement; rather, she contends that she told Human Resources that Mr. Chavez had allowed Mr. Cruz to leave work early several times, not that he did in fact do so on July 18. (PRDSMF ¶ 44; see also PSMF ¶ 171.)

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[13]Mr. Smith's notes of his interview with Plaintiff on July 22 record that she made the same claim to him. (Invest. Notes at 25.)

Plaintiff also told Ms. Strozier that she had received improper text messages from Mr. Chavez, but Plaintiff never produced the messages. (DSUMF ¶ 34; PRDSMF ¶ 34.) Plaintiff also told Ms. Strozier that she had received improper telephone calls from Mr. Chavez. (DSMF ¶ 35; PRDSMF ¶ 35.) When Mr. Chavez produced his cell phone to Ms. Strozier for inspection, she did not see any calls made to Plaintiff on that telephone. (DSMF ¶ 36; PRDSMF ¶ 36 (admitting DSMF ¶ 36, but asserting that Mr. Chavez could have deleted the call history).)[14]

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[14]During the interview, Ms. Strozier also learned that Plaintiff had complained in the past about inappropriate comments or conduct by Mr. Reyes, Mr. Taylor, and Mr. Scott. (PSMF ¶ 166, as modified per record cited.)

During the interview, Plaintiff initially told Ms. Strozier that she did not have any witnesses to the alleged harassment by Mr. Chavez. (DSMF ¶ 39; PRDSMF ¶ 39.) Approximately an hour after her interview concluded, Plaintiff reported that she had a witness after all--Pierre Hebert. (DSMF ¶ 40; PRDSMF ¶ 40.) Ms. Strozier then interviewed Mr. Hebert, who reported that he had seen Mr. Chavez touch Plaintiff on July 18, although he had not reported the incident when he saw it. (DSMF ¶ 41; PRDSMF ¶ 41.)

Ms. Strozier testified that when Mr. Hebert first walked into the interview room, she asked him if he had talked with Plaintiff within the past hour. (Strozier Dep. at 138.) Mr. Hebert responded that he had not. (Id.) Mr. Herbert then reported that he had seen Mr. Chavez grab or hit Plaintiff on the buttocks. (Id.; see also PSMF ¶¶

167-68, as modified per DRPSMF ¶¶ 167-68.) When Ms. Strozier asked Mr. Hebert how Plaintiff would have known that he had seen the incident, he replied, "I don't know." (Strozier Dep. at 138.)[15]

Mr. Hebert's statement to Ms. Strozier that he had not talked to Plaintiff was untrue. It is undisputed that Mr. Hebert talked to Plaintiff immediately after Ms. Strozier interviewed her. (DSMF ¶ 43; PRDSMF ¶ 43.)[16] According to Plaintiff, when she came back to the plant floor after Ms. Strozier had interviewed her, she saw Mr. Hebert closing down his computer. (Pl. Dep. at 149.) Mr. Hebert asked where Plaintiff had been, and Plaintiff replied that she was going to work in the office. (Id.) Plaintiff testified that Mr. Hebert looked at her strangely, which made her feel as if he knew something, so she asked, "Is there anything you know?" (Id.) Mr. Hebert replied that he knew something, and when Plaintiff asked if he had seen what had occurred between her and Mr. Chavez, Mr. Hebert said that he had. (Id.) When Plaintiff told Mr. Hebert that Ms. Strozier had asked if there were

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[15] In DSMF ¶ 42, Defendant proposed that Mr. Hebert told Ms. Strozier that he had not talked with Plaintiff after her interview with Ms. Strozier. The record supports that proposed fact. Ms. Strozier interviewed Plaintiff, who could not provide the name of any witnesses to the incident, and then interviewed an employee named Rosalinda. While Ms. Strozier was interviewing Rosalinda, Plaintiff returned to the Human Resources Office and told Ms. Coronel that she now had a witness--Mr. Hebert. Ms. Strozier immediately called Mr. Hebert to her office, finished the interview with Rosalinda, and then interviewed Mr. Hebert. (Strozier Dep. at 137-38.) Because a very short time period had elapsed between Plaintiff's inability to identify a witness and Plaintiff's identification of Mr. Hebert as a witness, Ms. Strozier became suspicious that Plaintiff and Mr. Hebert had talked during that brief interval. Ms. Strozier therefore asked Mr. Hebert if he had talked to Plaintiff, and he denied that he had.

[16] Although Ms. Strozier had not known Mr. Hebert to lie to her before that date, she believed that he had lied on this occasion. (PSMF ¶ 169; DRPSMF ¶ 169; Strozier Dep. at 139-41.)

any witnesses, Mr. Hebert said, "Give her my name." (Id.)

5. Further Allegations

During her deposition, Plaintiff testified about other alleged inappropriate comments and/or conduct by Mr. Chavez. Although Plaintiff provided no dates on which any of the following events occurred, she testified that Mr. Chavez:

- told Plaintiff that Mexicans should not shave their private parts (PSMF ¶ 136);
- told Plaintiff that she dressed like a man and should dress sexier (id. ¶ 137);
- used a measuring tape to simulate his penis and told Plaintiff that he had "a big one" (id. ¶¶ 138-39);[17]

[17] Plaintiff proposed that five of Defendant's employees used tools to simulate their penises or engaged in simulated sex with equipment (see PSMF ¶¶ 105-06), that Ms. Price told Mr. Scott about it (id. ¶ 107), and that he took no action to stop it (id. ¶ 108). Judge Johnson correctly deemed those proposed facts immaterial. (Final Report & Recommendation at 20 n.27.) To

- stood behind Plaintiff while she was working and made gestures as if he were having sex with her (id. ¶ 140);[18]

- stuck his tongue out at Plaintiff while looking at her private parts (id. ¶ 141);

- solicited Plaintiff to a hotel to have sex (id. ¶ 142);

- solicited Plaintiff to a tunnel in the Plant to have sex (id. ¶ 143);

- hugged Plaintiff from behind and pulled her close to his belly (id. ¶¶ 144-45);[19] and

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the extent that Plaintiff objects to this conclusion, the Court overrules the objection.

[18] Plaintiff complained about this incident to Mr. Blankenship, who spoke to Mr. Chavez, and Plaintiff testified that she was happy with the way Mr. Blankenship handled this complaint. (Pl. Dep. at 126-28.)

[19] Plaintiff testified that she did not report the hug because Mr. Chavez reportedly told her that if she went to Human Resources, then Ms. Strozier would dismiss her. (Pl. Dep. at 129.) Judge Johnson properly sustained Defendant's hearsay objections to PSMF ¶¶ 149-51. (Final Report & Recommendation at 21 n.29.) As Judge Johnson noted: "What is undisputed is that [P]laintiff never heard Ms. Strozier say that she was looking to get rid of her." (Id. (citing DSMF ¶ 51; PRDSMF ¶ 51).) To the extent that Plaintiff objects to Judge

- told Plaintiff that she was old, fat, and ugly (id. ¶ 146).[20]

6. Plaintiff's Discharge

Ms. Strozier completed her investigation and conferred with Mr. Wright, and then terminated Plaintiff's employment on July 30, 2015. (DSMF ¶ 45; PRDSMF ¶ 45; see also PSMF ¶ 170; DRPSMF ¶ 170.) Defendant asserts that it decided to discharge Plaintiff based on three issues that Ms. Strozier discovered during her investigation of Plaintiff's complaint against Mr. Chavez: (1) Plaintiff had threatened violence against Mr. Duque; (2) Plaintiff had a pattern of arguing about her job duties

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Johnson's evaluation of these proposed facts, the Court overrules the objection.

[20]Defendant admits that Plaintiff so testified. (DRPSMF ¶¶ 136-46.) Judge Johnson properly excluded as immaterial PSMF ¶ 109. (Final Report & Recommendation at 21 n.30.)

and attempting to make others perform those duties; and (3) Plaintiff made untrue statements before and during the investigation into her sexual harassment allegation. (DSMF ¶ 46.)

Defendant issued a "Counseling and Corrective Action Documentation" to Plaintiff at her termination, which provided, in relevant part:

> Lorena has been previously written up for failure to follow instruction and being argumentative when given direction. She has been addressed for several situations in which she became argumentative, verbally abusive and/or physically threatening to other associates. After a thorough investigation in her department it was determined that Lorena has continued to engage in confrontations with associates, team leaders, and supervisors. She has refused or been difficult when given direction by her team leader or supervisor, made statements threatening action against associates, and constantly engaged in conversations with other associates or staff when other work was to be performed. These continued violations of the code of conduct will not be tolerated.

> In addition, Lorena made statements during the investigation that could not be corroborated.

(Pl. Dep. Ex. 10 (Docket Entry No. 50-4) at 28; see also PSMF ¶ 181; DRPSMF ¶ 181.)

The "Counseling and Corrective Action Documentation" form also listed five instances of prior discipline issued to Plaintiff over the preceding ten years under the heading, "Previous Counseling and Date(s) for the Same Infraction:"

> 10/16/2014-Verbal Warning; 9/11/2012-Verbal Warning; 4/29/2010-Final Warning[;] 3/24/2010-Written Warning; 7/25/2005-Written Warning[.]"

(Pl.'s Dep. Ex. 10 at 28-29; see also DSMF ¶ 48; PRDSMF ¶ 48.)[21]

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[21]Judge Johnson properly excluded as immaterial PSMF ¶ 182, and correctly excluded DSMF ¶ 49 because it inaccurately summarized the documentary evidence that it cited. (Final Report & Recommendation at 23 n.32.)

The Written Warning dated July 25, 2005, was issued to all Stamping Department associates for marking parts with profanity or graffiti. (Pl. Dep. Ex. 3 (Docket Entry No. 50-4) at 9.) The Written Warning dated March 24, 2010, was issued to Plaintiff for confronting another employee, Delano Brewer, with abusive language. (Pl. Dep. Ex. 4 (Docket Entry No. 50-4) at 10-12.) The Final Warning dated April 29, 2010, which was accompanied by a one-day suspension, was issued to Plaintiff for using abusive language toward another employee, Sotero Cruz. (Pl. Dep. Ex. 5 (Docket Entry No. 50-4) at 13-15.)[22] The Verbal Warning dated September 11, 2012, was issued to Plaintiff for insubordination when her team leader asked her for the band cutters and Plaintiff refused to hand them over. (Pl. Dep. Ex. 7 (Docket Entry No. 50-4) at 19-21.) Finally, the Verbal Warning dated October 16, 2014, was issued to Plaintiff for poor job performance. (Pl. Dep. Ex. 8 (Docket Entry No. 50-4) at 22-23.)[23]

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[22]Plaintiff testified that she was sent home that day because Mr. Blankenship was not at work to handle the situation, and stated that the person with whom she had the confrontation, Mr. Cruz, was also sent home. (PSMF ¶ 178; DRPSMF ¶ 178.)

Plaintiff disputes the write-up reflected in Exhibit 4. (See PRDSMF ¶ 49 (citing Pl. Dep. at 62, 187).) Plaintiff testified that she did not recall the confrontation documented in Exhibit 4 because it never happened. (Pl. Dep. at 62-63.) Plaintiff also denied the contents of Exhibit 5 (id. at 67-72), and asserted that someone had forged her signature on that document (id. at 186-87).

[23]Defendant contends that three of those write-ups reflect that Plaintiff had received previous discipline for engaging in confrontations with co-workers. (DSMF ¶ 49, citing Pl. Dep. Exs. 4, 5, and 7.) As Judge Johnson noted, only two of the write-ups, Exhibits 4 and 5, related to confrontations with co-workers. (Final Report & recommendation at 24 n.34.)

Defendant's written progressive disciplinary policy does not state a time period for which a Verbal Warning remains in effect. (PSMF ¶ 173; DRPSMF ¶ 173.) Defendant's written progressive disciplinary policy, however, provides that both Written Warnings and Final Warnings remain in effect for six months. (PSMF ¶ 174; DRPSMF ¶ 174.)[24]

Plaintiff's Georgia Department of Labor Separation Notice states that Defendant terminated Plaintiff's employment for "Violations of Standards of Conduct." (PSMF ¶ 179; DRPSMF ¶ 179.) Plaintiff's Georgia Department of Labor Unemployment Benefits form provides the following reasons for termination: "Failure to follow instruction and being argumentative when given direction. Engaged in confrontations with associates, team leaders and supervisors." (PSMF ¶ 180; DRPSMF ¶ 180.)

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[24] The Court agrees with Judge Johnson's decision to exclude PSMF ¶ 175 as immaterial and PSMF ¶ 176 as unsupported. (Final Report & Recommendation at 24 n.35.) To the extent that Plaintiff objects, the Court overrules the objection.

7. Plaintiff's Charge of Discrimination

On August 18, 2015, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (the "EEOC"). (DSMF ¶ 52; PRDSMF ¶ 52.) The charge alleges sex discrimination and retaliation. (See Pl.'s Charge (Docket Entry No. 50-4), at 32-33.) Plaintiff is not aware of Defendant firing an employee for reporting sexual harassment. (DSMF ¶ 50; PRDSMF ¶ 50.) When asked during her deposition whether Defendant had fired her for making a complaint, Plaintiff responded, "I don't know." (DSMF ¶ 47; PRDSMF ¶ 47.)

III. Summary Judgment Standard

The Court applies the same summary judgment standard as set forth in the Final Report and Recommendation. (Final Report & Recommendation at 25-27.)

IV. Discussion

A. Plaintiff's Federal Claims

Plaintiff alleges sexual harassment and retaliation in violation of Title VII. The Court addresses those claims in turn.

1. Plaintiff's Sexual Harassment Claim

Judge Johnson accurately set forth the law governing Plaintiff's sexual harassment claim. (Final Report & Recommendation at 27-29.) The Court agrees with Judge Johnson that Plaintiff failed to create a genuine dispute as to the fourth element of her sexual harassment claim, which required Plaintiff to show that the harassment was both subjectively and objectively severe or pervasive. (Id. at 29-34.) The Court, like Judge Johnson, presumes "that [P]laintiff subjectively felt that Mr. Chavez's comments or conduct were severe or pervasive." (Id. at 29.) The objective component of this factor, however, is "judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (internal quotation marks and citation omitted). When concluding this analysis, the Court considers (1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and (4) whether the conduct unreasonably interferes with the employee's job performance. Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 808-09 (11th Cir. 2010). No single factor is required. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). The Court considers the evidence of harassment cumulatively and in the totality of the circumstances. Reeves, 594 F.3d at 808.

The Court agrees with Judge Johnson that, "[with regard to frequency, it is difficult to determine how often Mr. Chavez said or did things to [P]laintiff that might constitute sexual harassment." (Final Report & Recommendation at 30.) As Judge Johnson noted:

> In her deposition, [P]laintiff could not recall exactly when the alleged misconduct began, but testified that it was when Mr. Blankenship still worked for [Defendant] and before Mr. Strozier began working for [Defendant]. Because Mr. Blankenship left sometime in 2013 and Ms. Strozier started there in September 2012, viewing the evidence in a light most favorable to [P]laintiff, these incidents began sometime

> before September 2012. Between September 2012 and July 2015, [P]laintiff lists nine incidents between her and Mr. Chavez (most of which she did not mention to Ms. Strozier during the investigation). If one includes what allegedly occurred on July 18, then there are ten. Ten incidents over three years is not frequent.

(Id. at 30-31 (citations omitted).) The Court finds that Judge Johnson properly evaluated the record, and agrees that no genuine dispute remains as to the frequency of the incidents.

Likewise, Judge Johnson correctly determined that, as to severity, "most of what [P]laintiff attributes to Mr. Chavez are boorish comments" or uncouth non-verbal communications. (Final Report & Recommendation at 31 (collecting examples).) Plaintiff, however, reported only two acts of touching: (1) that Mr. Chavez touched her buttocks on July 18; and (2) that Mr. Chavez hugged her from behind and pulled her close to his belly. (Id.) The

Court agrees with Judge Johnson that "[t]he comments and conduct that [P]laintiff attributes to Mr. Chavez fall well short of the threshold level of 'severe or pervasive' established in Circuit precedent." (Id. at 31-32 (collecting cases).)

Judge Johnson correctly found that Plaintiff failed to create a genuine dispute as to the third factor, whether the conduct is physically threatening or humiliating, or a mere offensive utterance. (Final Report & Recommendation at 33.) As Judge Johnson noted, "[P]laintiff fails to submit probative evidence showing that the alleged incidents were so physically threatening or humiliating that they altered the terms and conditions of her employment. Instead, the comments were merely offensive utterances and the touching brief and isolated." (Id.)

Finally, the Court agrees with Judge Johnson that Plaintiff failed to create a genuine dispute as to whether Mr. Chavez's alleged conduct unreasonably interfered with Plaintiff's ability to perform her job. (Final Report & Recommendation at 33.) Judge Johnson correctly observed that "Plaintiff makes no allegation nor offers any testimony that she found her ability to do her job compromised by his alleged misconduct." (Id.)

In her Objections, Plaintiff argues that Judge Johnson failed to view the evidence in the light most favorable to her, and that Judge Johnson failed to weigh the evidence properly with respect to any of the four factors that are relevant to a hostile environment claim. (Pl.'s Objs. at 1-11.) The Court has examined the record in its entirety, and finds that Judge Johnson properly evaluated the relevant evidence and that he correctly applied the law. The Court therefore overrules this portion of Plaintiff's objections.

In sum, Judge Johnson correctly found that the evidence, viewed in the light most favorable to Plaintiff, demonstrated that no genuine dispute remained as to Plaintiff's sexual harassment claim. The Court therefore adopts this portion of the Final Report and Recommendation, overrules the corresponding portion of Plaintiff's Objections, and grants Defendant's Motion for Summary Judgment as to Plaintiff's Title VII sexual harassment claim.

2. Plaintiff's Retaliation Claim

Judge Johnson accurately set forth the law governing Title VII retaliation claims. (Final Report & Recommendation at 34-36.) The Court agrees with Judge Johnson that a genuine dispute remains as to whether Plaintiff established the causal connection element of her prima facie case of retaliation. (Id. at 36-37.) Likewise, Judge Johnson properly found that Defendant satisfied its burden of production to provide a legitimate, non-discriminatory reason for terminating Plaintiff's employment. (Id. at 37-38.) Judge Johnson, however, correctly concluded that Plaintiff established a genuine dispute as to pretext. (Id. at 38-44.) As Judge Johnson noted, Defendant's claim that it terminated Plaintiff for threatening to have her husband beat up Mr. Dupree may be a pretext for discrimination because Plaintiff's evidence indicates that she did not make this threat. (Id. at 38-39.) Likewise, a jury could find that the second reason proffered by Defendant--that Ms. Strozier's investigation confirmed Mr. Chavez's complaint and Plaintiff's performance issues, which were consistent with her prior discipline, is pretextual. (Id. at 39-40.) First, Judge Johnson properly determined that "it is a stretch to describe what [P]laintiff reportedly said to Mr. Chavez in the break room as an 'inappropriate comment,'" that the performance issue that Mr. Chavez reported on July 22 was not consistent with Plaintiff's prior discipline, and that "[a] reasonable jury might conclude that [Defendant] did not act in good faith when it relied on long-expired discipline to support its termination decision." (Id. at 40 & n.40.) Finally, numerous factual disputes remain concerning Defendant's third reason for terminating Plaintiff: Defendant's claimed belief that Plaintiff made a false complaint of sexual harassment. (Id. at 41-44.) The Court agrees with Judge Johnson that: "An employer who terminates an employee only a few days after she engages in protected activity needs undisputed evidence of the employee's wrongdoing during that interim period in order for a court to summarily reject the employee's retaliation claim." (Id. at 44.) Defendant simply does not have such undisputed evidence, and a genuine dispute remains as to Plaintiff's Title VII retaliation claim.

With all due respect to Defendant, nothing in its Objections warrants a different result. (Def.'s Objs. at 1-10.) Once again, the Court has reviewed the record in its entirety. The Court's own review of the record demonstrates that the evidence, viewed in the light most favorable to Plaintiff, establishes a genuine dispute as to pretext. The Court therefore overrules this portion of Defendant's Objections.

In sum, the Court agrees with Judge Johnson that a genuine dispute remains as to Plaintiff's Title VII retaliation claim. The Court therefore adopts this portion of the Final Report and Recommendation, overrules Defendant's corresponding Objections, and denies Defendant's Motion for Summary Judgment as to this claim.

3. Punitive Damages

Defendant objected to the Final Report and Recommendation insofar as the Final Report and Recommendation did not address Defendant's request for dismissal of Plaintiff's punitive damages claim. (Defs.' Objs. at 10-11.) Plaintiff did not respond to Defendant's Objections, instead leaving this matter for the Court to sort out on its own. As an initial matter, the Court notes that, in light of the sheer number of issues and disputes raised by the Parties before Judge Johnson, it is certainly understandable that the Final Report and Recommendation did not address this claim.[25]

In any event, the Court agrees with Defendant that no genuine dispute remains as to Plaintiff's punitive damages claim. "Not every unlawful discriminatory act will support an award of punitive damages against an employer." Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999). "Punitive damages are available under the Civil Rights Act of 1991 only when the employer has engaged in 'discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'" Id. (quoting 42 U.S.C. § 1981a).) "[F]or Title VII cases, 'Punitive damages are limited . . . to cases in which the employer has engaged in intentional discrimination and has done so with malice or with reckless indifference to the federally protected rights of an aggrieved individual.'" Howell v. Compass Grp., 448 F. App'x 30, 37 (11th Cir. 2011) (second alteration in original) (internal quotation marks omitted) (quoting Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 529-30 (1999)).

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[25]Defendant devoted less than one page of its initial brief to this argument, and it contended that Plaintiff was not entitled to punitive damages because Mr. Chavez, the lone alleged harasser during the relevant period, was "not high enough up the corporate hierarchy to impute punitive damages to [Defendant]." (Defs.' Br. Supp. Mot. Summ. J. (Docket Entry No. 50-2) at 26).) Defendant did not address the argument at all in its reply brief. (See generally Def.'s Reply Supp. Mot. Summ. J. (Docket Entry No. 61).) Given that Defendant did not deem the argument sufficiently important to raise it in its reply brief, the Court is not overly impressed with Defendant's complaint that Judge Johnson failed to address the argument in the Final Report and Recommendation.

Further, "punitive damages will ordinarily not be assessed against employers with only constructive knowledge of the violations." Dudley, 166 F.3d at 1323. "To get punitive damages, a Title VII plaintiff must show either that the discriminating employee was high[ ] up the corporate hierarchy or that higher management countenanced or approved [his] behavior." Id. (alterations in original) (internal quotation marks and citation omitted); see also Howell, 448 F. App'x at 38 ("Dudley's high-enough-up-the ladder or 'corporate hierarchy' requirement for an award of punitive damages against a corporate employer is still good law and still binds this Court.").

As an initial matter, Plaintiff's evidence does not support a finding that Defendant acted with malice or reckless indifference.[26] In any event, Plaintiff has not shown that the employees who allegedly discriminated against her were high enough up the corporate hierarchy

[26] As previously noted, no genuine dispute remains as to Plaintiff's sexual harassment claim.

to impose liability on Defendant for their behavior, and she certainly has not demonstrated that higher management countenanced or approved the behavior. See Dudley, 166 F.3d at 1323 (concluding that a store co-manager or manager of one of Wal-Mart's over 2000 stores were not high enough up Wal-Mart's corporate hierarchy to permit their acts to be the basis for punitive damages against Wal-Mart, and noting that the plaintiff had not shown that anyone higher than those two individuals had notice or knowledge of the discrimination against the plaintiff). The Court therefore finds that no genuine dispute remains as to Plaintiff's claim for punitive damages.

B. Plaintiff's State Law Tort Claim

Plaintiff also asserts a claim of negligent retention against Defendant for failing to protect her from the alleged misconduct of her co-workers, Mr. Reyes and Mr. Chavez. (First Am. Compl. ¶ 32.) Plaintiff bases this claim on O.C.G.A. § 34-7-20, which provides, in relevant part: "The employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency[.]" O.C.G.A. § 34-7-20.

Certainly, Georgia courts have recognized the right to recover in tort for negligent retention if the employer knew or should have known that one of its employees was sexually harassing the plaintiff-employee. Coleman v. Hous. Auth. of Americus, 191 Ga. App. 166, 170-71, 381 S.E.2d 303, 307 (1989); Favors v. Alco Mfg. Co., 186 Ga. App. 480, 483, 367 S.E.2d 328, 331 (1988); Cox v. Brazo, 165 S.E.2d 888, 889, 303 S.E.2d 71, 73 (1983). In each of those cases, however, the plaintiffs alleged underlying tort claims against their offending supervisors.

See Coleman, 191 Ga. App. at 170-71, 381 S.E.2d at 307 (involving a claim of intentional infliction of emotional distress); Favors, 186 Ga. App. at 480, 367 S.E.2d at 329 (asserting claims for sexual harassment, battery, and invasion of privacy); Cox, 165 Ga. App. at 889, 303 S.E.2d at 73 (alleging an assault claim).

A negligent retention claim, however, is subject to dismissal when there is no underlying tort upon which to base the claim. See Alhallaq v. Radha Soami Trading, LLC, 484 F. App'x 293, 297 (11th Cir. 2012) (per curiam) ("A negligent retention claim is properly dismissed when there is no underlying tort upon which to base it."); Tomczyk v. Jocks & Jills Rests., LLC, 198 F. App'x 804, 815 (11th Cir. 2006) (per curiam) (noting that the jury might have found that the defendant employer was not liable for negligent retention based on a belief that plaintiff failed to establish an underlying tort, and reinstating the negligent retention claim after reinstating part of the plaintiff's intentional infliction of emotional distress claim); Eckhardt v. Yerkes Reg'l Primate Ctr., 254 Ga. App. 38, 39, 561 S.E.2d 164, 166 (2002) (concluding that the trial court did not err by dismissing the plaintiff's negligent retention claim where there was "no underlying tort on which to base a negligent retention claim").

The Court agrees with Judge Johnson that, in this case, Plaintiff did not allege an underlying tort claim against Mr. Reyes or Mr. Chavez. (Final Report & Recommendation at 56.) Rather, Plaintiff contended that Defendant had "a common law duty to protect her from adverse employment actions motivated by discriminatory animus." (Id.) The Court agrees with Judge Johnson that Georgia courts "have never extended the law as [P]laintiff requests to allow an employee to sue her employer for negligence in allowing employment discrimination to occur." (Id.)[27] The Court follows the approach of other district courts that declined to expand the law in the manner urged by Plaintiff. See Alford v. Cosmyl, Inc., 209 F. Supp. 2d 1361, 1372 (M.D. Ga. Feb. 20, 2002) ("Plaintiffs essentially attempt to create a state law negligence cause of action for discrimination in employment. Acceptance of Plaintiffs' creative legal theory would result in making virtually every employment discrimination claim actionable under state law negligence principles. If the State of Georgia desires or

[27] Judge Johnson correctly declined to follow Harmon v. Airtran Airways, Inc., No. 1:06-CV-2613-ODE, 2009 WL 6357937 (N.D. Ga. Mar. 20, 2009), which allowed a negligent retention claim to proceed against the employer when no underlying tort was alleged against the harasser, as contrary to controlling Georgia law. (Final Report & Recommendation at 46 n.42.)

intends to provide its citizens with a state law remedy for employment discrimination, it has the means to do so through legislation enacted by the Georgia General Assembly. Absent a statutory or clear common law duty, this Court has no authority to abandon judicial restraint and create a new state law cause of action for employment discrimination."). The Court overrules Plaintiff's corresponding Objections. (Pl.'s Objs. at 11-14.)

Judge Johnson correctly rejected Plaintiff's attempt to raise new claims of assault and battery against Mr. Chavez. (Final Report & Recommendation at 47-48.) Notwithstanding Plaintiff's Objections, Plaintiff did not include those claims in her First Amended Complaint. (See generally First Am. Compl.; Pl.'s Objs. at 11-14.) Although Plaintiff argues that she raised the claims in

PSMF, a party may not amend a complaint through a response to a motion for summary judgment. (Final Report & Recommendation at 47-48.) Likewise, Plaintiff's discussion of those purported claims in her deposition did not satisfy Federal Rule of Civil Procedure 8(a)'s pleading requirements. (Id. at 48.) With all due respect to Plaintiff, nothing in her Objections warrants a different conclusion. (Pl.'s Objs. at 11-14.) Plaintiff failed to plead an underlying tort claim, and her negligent retention claim against Defendant cannot survive summary judgment.

In sum, the Court agrees with Judge Johnson that Plaintiff failed to create a genuine dispute as to her negligent retention claim. The Court therefore adopts this portion of the Final Report and Recommendation, overrules Plaintiff's corresponding Objections, and grants

Defendant's Motion for Summary Judgment as to that claim.

V. Conclusion

ACCORDINGLY, the Court **ADOPTS** the Final Report and Recommendation of United States Magistrate Judge Walter E. Johnson [63], **OVERRULES IN PART AND SUSTAINS IN PART** Defendant's Objections to the Final Report and Recommendation [65]. **OVERRULES** Plaintiff's Objections to the Final Report and Recommendation [66], and **GRANTS IN PART AND DENIES IN PART** Defendant's Motion for Summary Judgment [50]. The Court **GRANTS** the Motion as to Plaintiff's Title VII sexual harassment, negligent retention, and punitive damages claims, but **DENIES** it as to Plaintiff's Title VII retaliation claim.

The Court **ORDERS** the Parties to file their proposed consolidated pretrial order **WITHIN THIRTY (30) DAYS AFTER THE DATE OF THIS ORDER.** Unless the Court orders the Parties to file their Motions in Limine earlier, all Motions in Limine are due by no later than **FOURTEEN (14) CALENDAR DAYS** prior to the date on which the trial of this case is **first** scheduled to begin. Unless ordered by the Court to be filed earlier, all proposed requests to charge are due by no later than **SEVEN (7) CALENDAR DAYS** prior to the date on which the trial of this case is first scheduled to begin.

IT IS SO ORDERED, this the 5th day of December, 2016.

UNITED STATES DISTRICT JUDGE